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ADVISORY MEMORANDUM

TO: All Legislators

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SUBJECT: Elected Hawaiian Homes Commission

Introduction

This memorandum responds to a joint request from the President of the Senate and Speaker of the House of Representatives for research concerning the establishment of an elected Hawaiian Homes Commission. The study follows the outline suggested in the President's and Speaker's letter on the issues presented (see Appendix A), and examines these issues as applicable for both the House and Senate versions of H.B. No. 235, H.D. 2, S.D. 2 (1999), which would have provided for an elected Commission.

Although this memorandum makes several recommendations regarding the substantive provisions of the House and Senate versions of H.B. No. 235, it should be noted at the outset that the Bureau recommends that the Legislature follow the recommendations of the Attorney General on two important points as follows:

1. ***Rice v. Cayetano***. In testimony presented on March 24, 1999, to the Senate Committee on Judiciary and the Senate Committee on Water, Land and Hawaiian Affairs regarding H.B. No. 235, H.D. 2, S.D. 2 (see Appendix B), the Attorney General recommended that the bill be deferred until after the United States Supreme Court has issued a decision in Rice v. Cayetano, a case that “directly impacts on the voting right of native Hawaiians.” In particular, the Attorney General noted that “H.B. 235, H.D. 2, among other things, proposes that members of the Hawaiian homes commission be elected in the same way as OHA trustees rather than appointed.... If this bill becomes law before the U.S. Supreme Court rules, any resulting election of the Commission members would be subject to the U.S. Supreme Court ruling. Prudence requires that the bill be deferred until the U.S. Supreme Court rules in the Rice case.” Accordingly, the Bureau recommends that the Legislature follow the Attorney General’s recommendation to defer consideration of H.B. No. 235 until the resolution of Rice by the United States Supreme Court.

2. **Constitutional Amendment**. In testimony on March 19, 1996, before the Senate Committee on Judiciary and the Senate Committee on Hawaiian Affairs regarding H.B. No. 3919, H.D. 3 (see Appendix C), the Attorney General testified that an elected Hawaiian Homes Commission may violate the provisions of Article V, Section 6 of the State Constitution. The third paragraph of that section states that “[e]xcept as otherwise provided in this constitution, whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor.” Citing this express language and the legislative history of this language in the proceedings of the Constitutional Conventions of 1950 and 1968, the Attorney General stated: “Given the intent expressed by the drafters of section 6, article V, of the State Constitution, this bill may violate that provision.” Assuming that the position of the Attorney General has not changed since 1996, the Bureau recommends that the Legislature follow the Attorney General’s opinion, i.e., that a constitutional amendment is necessary before statutory amendments can be made.

The Legislature may wish to request a formal opinion of the Attorney General on these issues and other legal issues presented in this memorandum if for no other reason than to obtain their position in advance. Another issue on which the Legislature may wish to obtain a legal opinion is whether Congressional consent is required to amend the Hawaiian Homes Commission Act to provide for the election of commissioners. A 1998 Report to the Legislature on a proposal to provide for an elected Hawaiian Homes Commission noted the following arguments for and against obtaining Congressional approval:¹

Section 202 of the HHCA sets forth the composition of the HHC and how the commissioners are selected. Establishing an election process for selecting the commissioners will require amending §202, accordingly.

Section 4 of the Admission Act which is also incorporated as Article XII, Section 3, of the State Constitution provides that certain sections of the HHCA, including §202, can be amended in the State Constitution or in a manner required for State legislation without Congressional approval. Based on Section 4 and Article XII, Section 3, several attorneys who have worked closely with the HHCA believe that amending Section 202 of the HHCA to provide for elected commissioners will not require Congressional approval.

However, although Congressional approval would probably not be required, pursuant to a 1987 agreement between the State and the federal government, all amendments to the HHCA are to be submitted to the U.S. Secretary of the Interior for review. Under the agreement, the DHHL is required to submit any amendments to the Secretary of Interior within 180 days of the close of the legislative session along with a legal opinion regarding whether Congressional approval is required. The Secretary then transmits the amendments to Congress along with the Department of the Interior's own recommendation concerning Congressional approval.

Whether or not Congressional approval is required to amend the Hawaiian Homes Commission Act to provide for the election of commissioners, the Bureau recommends that any bill passed by the Legislature seeking to amend that Act include the Bureau's standard severability boilerplate language, which is generally included in bills that seek to amend the Hawaiian Homes Commission Act, as follows:

¹ Bay, Maile and John, *Report on the Hawaiian Homes Commission in Response to H.C.R. No. 135 (1998)*, prepared for the Department of Hawaiian Home Lands (Honolulu: December 1998), p. 37 (hereafter cited as the "1998 HHC Report").

The provisions of the amendments made by this Act to the Hawaiian Homes Commission Act of 1920, as amended, are declared to be severable, and if any section, clause, or phrase, or the application thereof to any person or circumstance is held ineffective because there is a requirement of having the consent of the United States to take effect, then that portion only shall take effect upon the granting of consent by the United States and the effectiveness of the remainder of this Act or the application thereof shall not be affected.

Additionally, it should further be noted at the outset that the joint request from the President and Speaker requesting this memorandum is fairly limited in scope, and asks that the Bureau focus specifically on the House and Senate versions of H.B. No. 235 as a base, in order to continue deliberations on this measure during the year 2000 Regular Session. Accordingly, the Bureau has generally confined its remarks to the issues presented as it relates to that bill, as applicable, except where a discussion of other areas is pertinent.

Finally, as used in this report, the following terms have the following meanings:

“BOE” means the Board of Education.

“DHHL” means the Department of Hawaiian Home Lands.

“HHC” means the Hawaiian Homes Commission.

“HHCA” means the Hawaiian Homes Commission Act of 1920, as amended.

“House version” refers to H.B. No. 235, H.D. 2 (1999).

“OHA” means the Office of Hawaiian Affairs.

“Rice” or “Rice v. Cayetano” refers to the case cited at 963 F.Supp 1547, 146 F.3d 1075, *cert. granted*, March 22, 1999, Order No. 98-818.

“Senate version” refers to H.B. No. 235, H.D. 2, S.D. 2 (1999).

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1. Voter Eligibility

The Effects of *Rice v. Cayetano*

On its face, Rice v. Cayetano concerns the constitutionality of restricting the voting for OHA trustees to Hawaiians. However, its potential impact is far greater, and the United States Supreme Court does not have to follow a strict either/or position on this matter. The Court could include language for its decision that could undercut substantive programs for Hawaiians, and even OHA itself. The Rice brief gives the Court a number of bases on which the Court could attack Hawaiian programs generally.

Rice's Supreme Court brief raises limited 15th Amendment rights ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."), as well as the far broader 14th Amendment rights ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws.") in arguing that the voter pool should encompass all state residents. But the Rice brief also tangentially attacks fundamental issues relating to Hawaiian rights and entitlements. It makes statements such as "government-sponsored racial discrimination is inherently suspect and will not be tolerated." It attacks the parity with Native American tribes that the Hawaiians are trying to establish to justify the separate voting, but which can also be used to justify substantive advantages, such as sovereignty.

One particularly troubling challenge is made to the use of the ceded land funds. As originally established in the Admissions Act, the ceded land funds are to be used:

...as a public trust for the support of the public schools and other public educational institutions, for the betterment of conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership, on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.²

From 1959 until 1978, all the ceded land trust funds were deposited into the general fund. However, as the "betterment of conditions of native Hawaiians" is one of the five purposes listed for the funds, when OHA was created in 1978 it was funded with one-fifth of the ceded land funds. Rice's

² Admission Act, sec. 5(f).

brief calls the funding of OHA with ceded land funds “blatant discrimination” and a bizarre and wrongheaded interpretation of the Equal Protection clause.” It attacks the usage of ceded land funds to support OHA by stating that “Hawai’i’s race-neutral distribution of the proceeds of the public lands from 1959 to 1978 shows that the State is capable of ‘honor[ing] the trust’ without recourse to race discrimination.” In short, the Rice brief attacks not only OHA voting, but OHA’s primary funding and purpose.

On the other hand, OHA’s brief takes the position that Hawaiians have the status of native Americans (Indians) as the United States Constitutional provisions on Indians and Indian tribes applied to all aboriginal peoples who were citizens of another nation before incorporation into the United States. It states that Hawaiians have a “special status” as aboriginal people to justify the voting restriction. This concept, if accepted by the Court, could lead to not merely a justification of the voting but give Hawaiians a more sound footing to pursue remedies for the overthrow of the monarchy, including possible moves toward some form of sovereignty. The Solicitor General, who also submitted a brief in favor of the OHA voting model, does not go this far; the brief states that the use of the public trust funds is “not challenged in this appeal,” and the Court must decide only “whether Hawai’i may limit those who vote to those for whose benefit the trust was established.”

The website www.nativehawaiians.com posted a summary of some of the questions posed by the justices during oral argument. While it is not always possible to tell the tenor of a justice’s final position from the questions, assuming that none are playing devil’s advocate to their true feelings to any degree (which is a major assumption), a diversity of opinions exists. Justice Ginsburg seems to have been the most sympathetic to the State’s position, with comments like “The U.S. had a large hand in destroying their sovereignty. The “remorse” resolution acknowledges that. If it works for Native Americans, I don’t understand why it doesn’t work for native people who were stripped of their sovereignty.” However, there were a significant number of questions, mainly from Justices Scalia and Rehnquist, critical of the comparison of Hawaiian to native Americans and hinting that this was the kind of reverse discrimination suit of which the majority of the court disfavors (Scalia: “Is [the Mancari case] based on the premise that we treated their ancestors shamefully, which we did, and that now we should rectify those wrongs?”). Justice O’Connor specifically pointed out that the State, even if delegated federal authority, still could not violate the 14th or 15th Amendments.

The wide-ranging nature of the justices' concerns and the potential range of the ruling make it difficult to predict the nature of the final decision. Broadly speaking, the court has four options:

- (1) Uphold the voting, and make no mention of the substantive issues;
- (2) Uphold the voting, and to add enough dicta (language in the opinion not directly related to the outcome of the case but which the court intends for guidance in other cases) to support the Hawaiians' goals of reparations and even sovereignty;
- (3) Strike down the voting, and make no mention of the substantive issues; and
- (4) Strike down the voting and add dicta that can be used to attack use of the public land trust funds for Hawaiians, and possibly other Hawaiian-oriented programs, including the Hawaiian Homes Commission Act, as well.

Under the first option, the status quo remains. Rice may want to file a new suit attacking the substantive programs and funding for Hawaiians, but he would not have any more basis to do so that might exist now. Under the second option, further suits by Rice would probably be thwarted, and new options for the Hawaiian sovereignty movement might emerge. Under the third option, the voting would have to be extended to all residents, but OHA would still exist, and Hawaiian programs would continue. However, Rice (or someone else) might use the ruling as a wedge to open the door to attack substantive programs. Under the fourth option, while no substantive programs would be attacked automatically, the stage will be set for someone to attack the use of the ceded lands funds to support OHA, and maybe other programs benefiting Hawaiians as well, including the Hawaiian Homes Commission Act. The danger to the program would depend, in large part, on the Court's language.

Should Voters Be Limited by Certain Criteria?

The Bureau was asked whether voters for an elected Hawaiian Homes Commission should be limited by:

- (1) Some Hawaiian blood quantum?

- (2) Eligibility to receive a homestead lease?
- (3) Current status as a homestead lessee?
- (4) Any other criteria?

An associated question was how would the base of eligible voters, however constituted, be determined.

The 1998 *Report on the Hawaiian Homes Commission in Response to H.C.R. No. 135 (1998)* (cited earlier)³ involved holding forums on all islands on issues relating to an elected Hawaiian Homes Commission. Only 200 people showed up, and only 169 people participated in the straw poll that took place at the meetings. The majority of straw poll participants (110) were native Hawaiians (50% blood quantum or greater), of which a substantial number (77) were also lessees. A number of participants were on the waitlist (41). Only a small number of participants had less than 50% blood quantum (13) or were homestead residents with less than 25% Hawaiian blood (9).⁴

Given the composition of this group, it is not surprising that their straw poll reveals a distinct bias toward permitting lessees to vote (103), all native Hawaiians vote (83), or all waitlist applicants vote (73). A smaller but still considerable number (63) were in favor of allowing all Hawaiians to vote.⁵ A discussion of these options follows.

(1) Some Hawaiian Blood Quantum

It is not clear whether “some Hawaiian blood quantum” means “a specified blood quantum” or “any amount of Hawaiian blood at all,” so both will be discussed. If the former, it is assumed that this question means some Hawaiian blood quantum other than 50% or more, as the latter category would be the same as the second, eligibility to receive a homestead lease. It is unclear what an appropriate percentage would be, if not 50% or more. To date, Hawaiians as a group have not been particularly blood-quantum conscious. They are not divisive and welcome all who have Hawaiian blood as Hawaiians, unlike some Mainland native American tribes which only permit persons to be on the tribal rolls if they have at least a specified percentage of their heritage from that tribe.

³ See *supra* note 1.

⁴ *Id.*, Appendix E.

⁵ *Id.*

There would be little positive benefit, and a great deal of resistance, in classifying Hawaiians into any groups other than the existing 50% or more, or those with any amount of Hawaiian blood. There is already some feeling in the Hawaiian community that the 50% or more figure is divisive, as is demonstrated by polls in which those with less than 50% Hawaiian blood favor decreasing the blood quantum requirements to Hawaiian Home Lands, while those with more oppose it. Splitting the community further – into a 50% or more group who can receive Hawaiian home lands; a second group, for example those with one quarter blood or more, who can vote for Hawaii Home Land commissioners; and a third group, those with less than one quarter Hawaiian blood, who can do neither, would appear to be unpopular with the Hawaiian community.

The more feasible option socially, then, under this category, is to allow persons with any Hawaiian blood to vote. The issue then becomes how to determine who has Hawaiian blood. The most feasible way in which this could be done is to require each voter to present a birth certificate. However, this is not foolproof. In preparing the 1998 LRB report, *Hawaiian Demographic Data: 'Ehia Kanaka Maoli?*, Susan Jaworowski spoke with Dr. Alvin Onaka at the Department of Health, who informed her that the Vital Statistics office receives numerous requests for those who are allegedly Hawaiian but whose birth certificates do not so state, who want to amend their birth certificates to list that status. He added that he is also aware of parents of non-Hawaiian ethnicity who nevertheless claim to be Hawaiian on their children's birth certificates to entitle their children to receive benefits available to Hawaiians. Thus, there is some fluctuation in the pool of those whose birth certificates state a Hawaiian identity. According to Dr. Onaka, there is no test or genetic marker for Hawaiian ethnicity. The modern equivalent of the Hawaiian genealogy, the birth certificate, is the most commonly used method to show Hawaiian ancestry, but it is susceptible to manipulation. If this option is chosen, a challenge mechanism should be made available to challenge those who may not actually be Hawaiian.

(2) Eligibility to Receive a Homestead Lease

At present, the only persons eligible for a homestead lease are persons who are 50% or more Hawaiian by blood quantum (HHCA sec. 201) and, as successors, specific relatives (spouse, child, or grandchild) of an existing lessee, who are themselves at least one-quarter Hawaiian (sec. 209). While

there has been discussion from time to time about decreasing the threshold for all applicants to one-quarter Hawaiian blood, this had been resisted by some of those who presently are 50% or more Hawaiian, on the grounds that all of their group should be taken care of first.⁶

It makes some sense to limit voters of an elected Hawaiian Homes Commission to all Hawaiians who are potentially eligible to receive a lease, although determining the pool of voters is problematic. First, it is not as easy as simply using the Department of Hawaiian Home Lands waiting list for a voter pool, as not all Hawaiians who are eligible are on the waiting list. There would need to be created a separate voter pool, with provisions for determining blood quantum similar to those currently used by the Department of Hawaiian Home Lands. The current voter list could be transferred over intact, with no need to make those persons re-register or prove their blood quantum. However, the rest would probably have to undergo a similar process, which involves showing three generations of birth certificates (applicant, applicant's parents, and applicant's grandparents) to prove adequate Hawaiian blood quantum plus an interview. This would be very time-consuming.

It was impossible to come up with accurate, up-to-date statistics involving blood quantum, as the latest study on blood quantum was done in 1984. Thus the figures in this memorandum are extremely soft, as 1984 statistics are being compared to 1996 statistics. Nevertheless, these figures, although admittedly not current, provide a rough estimate of some of the issues surrounding this question. According to the 1998 Native Hawaiian Data Book, table 1.18, as of 1984 blood quantum, there were over 53,000 persons of 50% or more Hawaiian ancestry in the State age 20 and older. If the category of 5- to 19-year-olds is added, the members of which are now 20 and over, the number swells to 75,268, not counting those who have passed away during this period. As of the last DHHL annual report, as of June 30, 1998, there were 6,547 lessees on the land. The number of individuals on the wait list is not possible to determine with any exactitude. According to DHHL, there are over 30,000 wait list applications, but some lessees have more than one application on the wait list, as lessees can apply for residential, agricultural, and pastoral lots. There are up to 36,000 people who have already registered with the DHHL for a lot. Given a total potential voter pool of up to 75,000, there is a

⁶ See, e.g., "OHA case draws talk of blood quantum," *The Honolulu Advertiser*, November 2, 1999, p. A-1, in which the Hou Hawaiians organization take the position that only 50% or greater Hawaiians should be able to vote for OHA trustees. The chairperson of the Hawaiian Homestead Association stated that if there is to be a lowering of the blood quantum requirement for ceded land revenues and homesteads, that should arise from the Hawaiians themselves and not be imposed by the government.

substantial number of eligible Hawaiians who would need to register with DHHL so that they can vote under this scenario.

This voter pool should also include those successors who are between one quarter and just under one-half Hawaiian blood. As they are lessees on the land, they have an interest in policies concerning the land. The voter pool should not include potential lessees (those one-quarter to almost-half Hawaiians who could be a successor to a lessee) as their interest is merely speculative and may never occur.

(3) Current Status as a Homestead Lessee

This would be the easiest voter pool to determine, as the names of these people should be on file with the DHHL and should be qualified by them to have the minimum specified blood quantum. However, while this would be an easy solution, it is not clear that this would be the best solution. At present the lessee pool is quite small, approximately 6500 people. When compared to the number of wait list applicants (about 30,000) and those who are eligible to apply (up to 75,000), these are just a small fraction of the people who may be said to have a legitimate interest in the administration of the home lands. As these groups have different interests as compared to the lessee pool, it may not be wise to place the lessee pool in sole charge of electing the commissioners.

The interests of the two groups -- the actual lessees and the wait list applicants -- differ in significant ways. The lessees on the land are more interested in improvements to the existing infrastructure, as many of the home lands lots are in rural, unimproved areas. The wait list applicants are more interested in construction of new homes and developments. It may be the case that lessees would tend to elect commissioners who would focus more on improving the existing lots, and not on new development, which would slow down the already glacial process of establishing new homes for wait list applicants. The commissioners, however, need to be responsive to both groups, the haves and the have-nots. For this reason, we do not recommend this alternative. The 1998 HHC Report, cited earlier, also supports this rationale, stating that:

As a general matter of trust law, the fiduciary duties of a trustee extend to both current and potential future trust beneficiaries. Commissioners cannot manage the trust solely for the benefit of the current beneficiaries.⁷

The Report also states that trying to distinguish between subsets of native Hawaiians to allow only some subsets to vote, rather than allowing the whole class of native Hawaiians to vote, is problematic.⁸

Summary

Of the three alternatives, using the voter pool of current lessees is the most problematic and should not be chosen. The other two are acceptable. A voting pool based on the number of people who are eligible to be lessees (all 50% or more Hawaiians) is partially determined already, as the existing lessees and the wait list applicants have already proven their ancestry. A substantial but unknown number of eligible voters would have to go through the complicated process of proving their ethnic percentage through three generations of birth certificates. It is unclear what kind of resources DHHL would have to process those applications in a timely manner. It should be noted that this scenario was the second-most popular choice in the straw poll discussed above, although, again, the voter pool for the straw poll was quite small and primarily composed of native Hawaiians (50% blood quantum or higher).

A voter population defined as those with some Hawaiian blood would only work if “some” means “any.” Voters would have to prove their heritage via their birth certificates, although this is not a foolproof method, as described above. The proof process would be easier than that for those with a specified blood quantum, as only the applicant’s own birth certificate would be necessary. This would not necessarily mean less work for the DHHL in determining who is eligible, as the voter pool would then increase substantially, from approximately up to 75,000 (all Hawaiians now age 20 and older with 50% or more blood quantum) to approximately 140,000 (all Hawaiians now age 20 and older) (data from the 1998 Native Hawaiian Data Book, tables 1.11 and 1.15). These figures are very approximate and are derived by adding these figures for the Hawaiian population derived from the 1984 Blood Quantum survey. As the survey took place over 15 years ago, these figures include the-then 5- to 19-

⁷ 1998 HHC Report, pp. 44-45.

year-olds, who at this time would be old enough to vote. The figures for both categories are artificially inflated as they do not account for any deaths during the intervening 15-year period. There is no way to calculate that figure. To the extent that exact and accurate numbers for Hawaiians of specific blood quantum is of concern to the State and its Hawaiian population, an updated blood quantum survey should be done.

One Person, One Vote

The question was asked: “how will the one person, one vote criteria be addressed if voters are limited by ... blood quantum, eligibility to receive homestead leases, or status as a homestead lessee?” This question confuses two issues: one person-one vote, and restricting voting to one subset of voters. These are two separate issues. The one person-one vote criteria means that in voting for a specified number of representatives, all positions shall have approximately the same number of voters in their respective voter pools. This is the reason why the OHA voting, for example, is set up the way it is, with all eligible voters voting on each representative, even though the representative is from a particular geographical area. The one person-one vote criterion is preserved because the voter pool is the same for each representative (in this case, the entire pool of voters).

The 1998 HHC Report puts forth the interesting proposition that the one person-one vote requirement possibly would not apply to an elected DHHL, as (1) the process may be viewed as an internal state government selection to run a department, (2) DHHL's land base is arguably the equivalent of a “special district” for which the strict applicability of the principle may not apply, or (3) as a trust for the benefit of an indigenous people, the courts might be willing to be more flexible.⁹ However, these grounds are by no means certain to persuade a court, and as they apparently run counter to the one person-one vote principle adopted by the United States Supreme Court, it is safe to say that disregarding them would be almost sure to invite at least a lawsuit if not invalidation. It would be the safer course to meet the one person-one vote standard.

Voting for the state legislature demonstrates another way to handle the one person-one vote system: the State is divided up into approximately equal voter pools, and so each representative

⁸ Id. at 44.

⁹ Id. at 42.

represents approximately the same number of voters. The drawback is that because O'ahu is so populous, the majority of representatives will be from O'ahu. However, according to the 1998 HHC Report, federal case law will permit the different voter groups to deviate up to 15 - 16% and still be considered to comply with one person-one vote standards.¹⁰ The 1998 HHC Report looked at Hawaiian voter populations and, tweaking the deviation figures, came up with figures that reduce the impact of O'ahu voters. If any Hawaiian can vote, the Report came up with figures of 6 representatives from O'ahu, two from Hawai'i, and one each from Maui, Moloka'i, and Kauai.¹¹

This system still favors O'ahu, but by fewer than might otherwise be the case. But for a situation where it may be important to have more clout by the minority, the OHA system (all voters to vote for island representatives) will work better than the legislative model (voter groups vote for own representatives) as it permits less disparity in numbers. As the vast majority of Hawaiian home lands are on the neighbor islands,¹² it is fair to let representatives from the neighbor islands have more impact by using the OHA voting structure, rather than the state legislature structure.

Restricting voting for an organization to a subset of voters, where those voters are beneficiaries of the organization, seems to be permitted by state law at this time. OHA is an example of that situation. However, it must be remembered that this is exactly the arrangement being attacked in the Rice v. Cayetano case, so that case will serve as a bellwether for the voting structure to be adopted for an elected Hawaiian Homes Commission.

¹⁰ Id.

¹¹ Id. at 43. The Report also came up with figures for only homestead lessee voters, and homestead lessees and applicants based on the island for which an application has been submitted. However, allowing less than the full class of native Hawaiians to vote is disfavored, as discussed in the text above.

¹² According to the 1998 Native Hawaiian Data Book, table 3.7, 58% of the lands are on Hawai'i, 15% are on Maui, 12% are on Moloka'i, and 10% are on Kaua'i. Only a little over 3% of all the Hawaiian home lands are on O'ahu, which means that, even if more native Hawaiians presently reside on O'ahu, they may eventually reside on the neighbor islands if they receive home lands lots there.

2. Member Qualifications

How Should Districting of Members Be Determined?

The safest model to follow would be that of OHA. In the OHA model, certain members are required to reside in a specified county and are commonly referred to as “the Maui representative,” “the Kauai representative” etc., but the designation refers only to where the representative resides, not the voters who vote on them. These representatives are actually voted on by all voters, in much the same way the board of education district members are voted on by all voters, not just by those in that district. See chapters 13 and 13D, Hawaii Revised Statutes. This method does conform with one person-one vote standards.

Should At-large Members Be Allowed?

The decision to have at-large members is a policy decision. There is not a right or wrong answer to this. The advantage of at-large members is that, at least theoretically, they can see the big picture, and not be tied down to a particular constituency. The drawback is that, because there is no residency requirement, the at-large representatives can end up coming from the population center, O’ahu, and exacerbate the O’ahu-centric voting. One of the reasons that the Honolulu City Council moved from at-large representatives to districts was because at one time four of the nine city council members lived within a mile of each other in the vicinity of Kahala. This is an area where input from the proposed voters would be a good idea.

Should Members be Limited to Those from a Certain Group?

The question was asked whether members of the commission should be limited to those with some Hawaiian blood, those eligible to receive a lease, current lessees, homestead dwellers, Hawai’i residents, United States residents, or some other criteria. This is a policy decision that differs from the choice, discussed above, as to what the voter pool composition should be. They do not have to be congruent. It is the voters who determine who will be elected, and, as a policy matter, there is no compelling reason to restrict their selection of representatives. There are negative reasons to restrict the representatives to small groups such as current lessees and homestead dwellers, despite the fact that

the straw poll in the 1998 HHC Report favored lessees as the class from which representatives should be drawn. It is not clear that such small groups (the current lessee group is only about 6,500) would produce enough interested and qualified candidates for all the positions. Also, as discussed above, as there is a certain tension between some current lessees who want funds spent on upgrading their infrastructure, and the wait list applicants who want more new development, it is not in the best interests of a fair and equitable administration of the trust to have only the former entitled to act as representatives.

While restricting representatives to a larger group, all eligible Hawaiians (with 50% or more Hawaiian blood), is facially more attractive, it again targets a relatively small group of people, and one whose numbers are more likely to shrink rather than grow. The rate of out-marriage for Hawaiians is over 50%,¹³ and there are very few pure Hawaiians left, approximately 4% of the total Hawaiian population.¹⁴ That means that the majority of these out-marriages will produce children with less than 50% blood quantum, and who are thus ineligible to apply for Hawaiian home lands. It is not wise policy to select representatives from an ever-shrinking pool of candidates.

The other facially attractive option is to limit the representatives to those who have any amount of Hawaiian blood. However, this could be a dangerous public policy move. Restricting representatives to Hawaiians would set the policy, not heretofore established by the state legislature, that only a group of potential beneficiaries can give fair representation to that group. It is true that OHA limits its representatives to the same background as its voting pool, but this restriction came directly from the 1978 Constitution Convention and was approved and made constitutional law by the voters, not by the legislature.

It is not good public policy for the state legislature to adopt the position that only the members of one particular group are fit to act as representatives. That, certainly, should be the voters' prerogative. If a majority of the voters decides that the best representatives are those who have the same ethnic background, the voters can cast their votes that way. If the voters are more interested in forms of merit other than ethnic background, the voters can vote the other way. In either case, once the classification of voters has been selected, the voters should be allowed the widest rational pool from

¹³ 1998 Native Hawaiian Data Book, Table 1.32.

which to draw their representatives. It could be a dangerous and socially unhealthy policy for Hawaii, with its generally tolerant ethnic structure, to do an about-face and decide as a matter of state policy that “only people like me” can be trusted to represent me.

That being said, the best option appears to be to require that the commissioners be Hawaii residents.¹⁵ This category is broad enough to encompass a substantial class of applicants who have ties to the State and would be generally sympathetic to the beneficiaries, without unduly and unnecessarily restricting the pool.

3. Source of Funding

There are currently two other programs in state government that are administered by elected bodies, namely, the Board of Education and the Office of Hawaiian Affairs.¹⁶ Where appropriate, these elected bodies are used in this memorandum as points of comparison with the elected Hawaiian Homes Commission proposed in both the House and Senate versions of H.B. No. 235.

Before responding to the questions posed in this section, the following is a brief overview of the various funds within the state treasury that are administered by the Hawaiian Homes Commission:

- Hawaiian Home Loan Fund (sections 213(b) and 214 of the Hawaiian Homes Commission Act): Moneys in this revolving fund may be used, among other purposes, for the repair or purchase of dwellings, purchase of livestock and farm equipment, development of tracts, and cultivation of land.

¹⁴ Id., Table 1.17.

¹⁵ The broader option, to just require United States residency, is not good policy. Article V, sec. 6 of the State Constitution requires all executive and administrative appointed officer, except the president of the University of Hawaii, to have been an Hawaii resident for at least one year. While these would be elected, not appointed positions, this language, coupled with the fact that all legislators and the OHA trustees, are required to be Hawaii residents gives a strong indication that state residency is a desideratum.

¹⁶ The Soil and Water Conservation Districts are not included in this discussion since they are administered under the auspices of the Department of Land and Natural Resources under chapter 180, Hawaii Revised Statutes, by a combination of both elected and appointed directors. See 1998 HHC Report at 20-21.

- Hawaiian Home General Loan Fund (section 213(c)): Moneys in this revolving fund may be used, among other things, for loans for the construction of homes, home repairs or additions, and the development and operation of a farm, ranch, or aquaculture operation.
- Hawaiian Home Operating Fund (section 213(e)): Moneys in this trust fund may be used for “construction and reconstruction of revenue-producing improvements intended to serve principally occupants of Hawaiian home lands”, including acquisition or lease of real property, water rights, and other interests; operation and maintenance of improvements; and purchase of water or other utilities, goods, or commodities needed for services.
- Hawaiian Home Receipts Fund (section 213(g)): This trust fund receives interest moneys from loans or investments received by the Department of Hawaiian Home Lands from any fund except as otherwise provided, which may be transferred at the end of each quarter to the Hawaiian Home Operating Fund, the Hawaiian Home Administration Account, the Hawaiian Home Trust Fund, and any loan fund in accordance with the Department's rules.
- Hawaiian Home Trust Fund (section 213(h)): Moneys in this trust fund are available for transfers into any other fund or account authorized by the Hawaiian Homes Commission Act or for any other “public purpose”, including the formation of an account as a reserve for loans insured or guaranteed by the Federal Housing Administration, Department of Veterans Affairs, or other federal agency.
- Native Hawaiian Rehabilitation Fund (section 213(i)): This trust fund receives thirty percent of state receipts derived from lands previously cultivated as sugarcane lands and from water licenses pursuant to Article XII, Section 1 of the Hawaii Constitution; moneys may be expended “solely for the rehabilitation of native Hawaiians”.

- Hawaiian Home Lands Trust Fund (section 213.6): This trust fund, which receives legislative appropriations, is to be used for “capital improvements and other purposes undertaken in furtherance of the Act”.
- Hawaiian Home Administration Account (section 213(f)): Moneys in this special fund “shall be expended by the department for salaries and other administration expenses of the department in conformity with general law applicable to all departments of the State, and no sums shall be expended for structures and other permanent improvements.”

How should the following be paid for / should expenses be paid from the general fund, the Hawaiian Home Administration Account, some other source, or a combination of the above? (These questions are combined, since they ask for virtually the same information.)

(1) HHC Administration and Operation Expenses

To the extent that the administration and operation expenses are attributable to a Hawaiian Homes Commission election, the Bureau recommends that these expenses be paid for out of the general fund for the reasons given in the next section.

To the extent that these expenses are attributable to the administration and operation of the Commission *other than* election-related expenses, the Bureau recommends that these expenses should be paid for out of a combination of state general funds and funds available from the Hawaiian Home Administration Account, since moneys in that account are intended to be used “for salaries and other administration expenses of the department”.

A January 1992 progress report on the implementation of the Federal-State Task Force on the Hawaiian Homes Commission Act noted that the State had “substantially completed” its original recommendation made in 1983 that “[a]dministrative services for the DHHL should be paid from State general funds, as are other State departments, rather than paid from revenues from Hawaiian home

lands that could be used directly for beneficiary programs.”¹⁷ The progress report noted that in 1991, the Hawaii State Legislature “approved DHHL's request as incorporated in the executive budget and appropriated \$8.38 million in general funds for all permanent staff and other operating costs for Fiscal Biennium 1991-1993. General Fund support now provides for about 46% of administrative and operating costs.”

A 1994 report by the Department of Hawaiian Home Lands noted that moneys in the Hawaiian Home Administration Account, which was established in 1941, “are to be expended by the department for salaries and all other administrative expenses of the department, excluding capital improvements, in the absence of general fund appropriation for operating and administrative cost.”¹⁸ That report further noted that funds of that account “must be incorporated in the Executive Budget and appropriated by the legislature before they can be used for salaries and operating costs. In the absence of any appropriation, other special funds were used in past years to finance temporary exempt positions. 55 permanent positions are financed by the Administration Account.”¹⁹

The 1997-1998 annual report of the Department of Hawaiian Home Lands noted that the General Appropriations Act of 1998²⁰ funded thirty-five permanent positions through general funds and eighty-three permanent positions through special funds. The amount of expenditures for these positions from the general fund totaled \$1,347,684, while the expenditures from the special fund totaled \$5,617, 529, for a combined total of \$6,965, 213 for fiscal year 1998-1999.²¹ Thus, the percentage of HHC special funds amounted to approximately 81% of the total funds spent on positions for that fiscal year.

¹⁷ Federal-State Task Force on the Hawaiian Homes Commission Act, “Progress Report on the Implementation of Recommendations of the Federal-State Task Force”, Submitted to the Committee on Energy and Natural Resources, U. S. Senate, January 1992, p. I-14, *reprinted in* Hearing Before the Committee on Energy and Natural Resources, United States Senate, One Hundred Second Congress, Second Session, on the Hawaiian Homes Commission Act, (Washington, DC: U. S. Government Printing Office, February 6, 1992), p. 68.

¹⁸ Department of Hawaiian Home Lands, Report of the Department of Hawaiian Home Lands to the Seventeenth Legislature, State of Hawaii, on House Concurrent Resolution No. 125, H.D. 1, S.D. 1, Requesting the Department of Hawaiian Home Lands to Submit an Annual Report on its Special, Trust, or Revolving Funds and Fund Transactions Carried Out Over the Previous Fiscal Year (Honolulu: February, 1994), p. 3.

¹⁹ *Id.*

²⁰ Act 116, Session Laws of Hawaii 1998.

²¹ Department of Hawaiian Home Lands, FY 1997-1998 Annual Report (Honolulu: 1998), p. 24.

It is unclear whether *all* HHC administrative expenses should be paid from state general funds, as noted in the 1992 progress report on the implementation of the Federal-State Task Force on the HHCA (cited earlier), or whether administrative expenses should be paid for out of a combination of general funds and funds from the Hawaiian Home Administration Account, which is apparently the current practice. While, ideally, administrative expenses should be paid for out of general funds to allow revenues from Hawaiian home lands to be used directly for beneficiary programs, this may be difficult as a practical matter, given the stagnant or at best uncertain economic projections for the State's economy.

(2) Election-Related Expenses

The only fund administered by the Hawaiian Homes Commission that is arguably applicable to the payment of election and related expenses is the Hawaiian Home Administration Account established under section 213(f) of the Hawaiian Homes Commission Act. The Senate version of H.B. No. 235 (section 11) requires that election-related expenses be paid out of that account. The House version, in contrast, provides for a general fund appropriation (section 13). The Bureau recommends that election-related expenses be paid for out of the state general fund for two reasons.

First, the funding of elections for the two other state programs that are administered by elected bodies is through the general fund. In particular, Board of Education elections are included on the same ballot as with other elections, allowing it to “piggyback” on state election costs. In contrast, additional general fund expenditures are required for Office of Hawaii Affairs Board of Trustees elections. These additional costs for OHA elections include separate costs for ballots (since separate ballots are issued for OHA voting), nomination papers, and voter registration.²²

Since both OHA and the BOE election expenses are paid from general fund revenues,²³ the Bureau believes that it would be inconsistent to require the Hawaiian Homes Commission to pay for its

²² Telephone interview with Robin Yokooji, Office of Elections, September 20, 1999.

²³ The Board of Trustees of the Office of Hawaiian Affairs and the Board of Education are each authorized to establish revolving and trust funds under statutory authority. These funds were reviewed in 1996 by the Hawaii State Auditor in its report to the Governor and Legislature. See Auditor, State of Hawaii, Review of Revolving and Trust Funds of the Office of the Governor, Office of Hawaiian Affairs, and the Department of Education (Honolulu: Report No. 96-21), December

own elections. In a September 23, 1999, letter to the Bureau (see Appendix D at p. 4), the Department of Hawaiian Home Lands commented on the unfairness of requiring the Department to pay for its own elections as follows:

According to the Office of Elections, the estimated cost to conduct the election every even-numbered year is \$358,000. Under the Senate version, the cost of the election shall be expended out of DHHL's Hawaiian home administration account. We do not agree with this proposal, since the election cost for the trustees of the Office of Hawaiian Affairs is expended through the general fund.

Second, the state elections law currently requires all election expenses for state elections that do not involve elections for county offices to be paid for by the State from appropriations made for that purpose. Specifically, section 11-182, Hawaii Revised Statutes (“election expenses when no county elections”), provides: “All expenses, including expenses attributable to registration of voters by the county clerk, for state elections conducted in any county which do not involve elections for county offices shall be borne by the State and paid out of such appropriations as may be made by the legislature for election purposes.” Section 11-181 (“capital equipment”) further requires the State to pay “for all voting system capital equipment” including such times as “voting machines, voting devices, and initial computer programs.”

(3) Expenses to Determine Eligibility

Both the House and Senate versions of H.B. No. 235 require the Department of Hawaiian Home Lands to be the agency responsible for verifying the qualifications imposed on candidates and voters by that bill.²⁴ The Bureau again recommends that these election-related expenses be paid for out of the state general fund, rather than the Hawaiian Home Administration Account established under section 213(f) of the Hawaiian Homes Commission Act, for the reasons identified in the previous section. The Bureau believes that expenses to determine voter (and candidate) eligibility are simply another incidental election cost for which the State should be required to appropriate funds.

1996. Presumably, the BOE and OHA could each be statutorily authorized to establish special funds in addition to their trust and revolving funds to pay for the administrative expenses of those boards, similar to the Hawaiian Home Administration Account.

What is the Cost Estimate for Each of the Above Items?

(1) HHC Administration and Operation Expenses

Both the House and Senate versions of H.B. No. 235 provide that the members of the Commission are to receive salaries, benefits, and expenses in the same amount and manner as provided by law for members of the Office of Hawaiian Affairs Board of Trustees. According to the Department of Hawaiian Home Lands, the estimated administration and operation expenses for an elected Hawaiian Homes Commission are as follows:

- Low Budget Scenario (minimum interpretation): Estimated annual cost is **\$447,395**, based on the following:
 1. Commissioner salaries - \$380,900.
 2. Transportation and per diem to attend regular public meetings, community meetings, special HHC meetings, and one out-of-state travel for the chairperson - \$17,680.
 3. Office space at \$1.75 square feet (current rate at present location) - \$4,725.
 4. HHC secretary's salary, transportation and per diem cost, and office space - \$44,090.
- High Budget Scenario (based on OHA current structure): Estimated annual cost is **\$1,093,210**, based on the following:
 1. Commissioner salaries - \$380,900.

²⁴ H.B. No. 235, H.D. 2 (1999), section 10 (p. 18, lines 11 to 15); H.B. No. 235, H.D. 2, S.D. 2 (1999), section 10 (p. 20, lines 4 to 10).

2. Transportation and per diem to attend regular public meetings, community meetings, special HHC meetings, and one out-of-state travel cost - \$24,720.
3. Salaries for individual commissioners' secretaries - estimated \$386,100.
4. Salaries for individual commissioners' aides - estimated \$257,400.
5. Office space at \$1.75 square feet for commissioners and staff - \$7,008.75.
6. HHC secretary's salary, transportation and per diem cost, and office space - \$44,090.

These two budget scenarios of the Department of Hawaiian Home Lands are based upon the following assumptions: (a) an elected Hawaiian Homes Commission will continue to serve as the planning and policy-making body for the Department of Hawaiian Home Lands; and (b) pursuant to Department rules, the Commission will continue meet at least once a month, and at least once a year on the islands of Kauai, Hawaii, Molokai, and Maui, as well as at various homestead communities on each island as practicable. A copy of the Department's September 23, 1999, letter and exhibit to the Bureau containing these budget figures and comments is attached as Appendix D.

(2) Election-Related Expenses

The Office of Elections has provided the following cost estimates for an elected Hawaiian Homes Commission under each of the House and Senate drafts of H.B. No. 235, as well as a comparison to the actual costs expended in 1996 and 1998 for the Office of Hawaiian Affairs elections, as follows:

- Office of Hawaiian Affairs - 1996 election (actual costs): **\$25,630**

1. Ballots (primary and general elections): \$25,234
2. Nomination forms: \$296

3. Certificates of election: \$100
- Office of Hawaiian Affairs - 1998 election (actual costs): **\$75,792**
 1. Ballots (primary and general elections): \$55,630
 2. Hawaiian translations for voter registration forms and ballot instructions: \$275
 3. Nomination forms: 490
 4. Certificates of election: \$100
 5. Voter registration county processing fee: \$19,297 (began in 1998)
 - Hawaiian Homes Commission election (House version): **\$357,998**
 1. Ballots: \$56,550
 2. Nomination papers: \$728
 3. Voter education: \$100,000
 4. Voter registration forms: \$200,720

Unknown costs: voter registration upgrade, Geographic Information System upgrade, ballot counting program software, precinct supplies, and cost of additional precinct officials (if needed).

- Hawaiian Homes Commission election (Senate version): \$655,373 to \$805,373

1. Ballots: \$57,723
2. Freight and delivery: \$2,000
3. Ballot packing: \$1,500
4. Printing: \$146,050
5. Hawaiian translations: \$500
6. Voter education: \$100,000
7. Voter registration file programming: \$150,000 (may be a one-time cost)
8. Voter registration county processing fees: \$48,000 (fees assessed by the County Clerks offices to process Hawaiian Homes Commission affidavits, not including Commission verification of voters processing fees)
9. Voting district maps: \$50,000 to \$200,000 (costs to modify Geographic Information System to create Hawaiian Homes Commission district line maps; costs are dependent on the number of district line changes from existing district lines, and may be one-time costs)
10. Additional precinct officials: \$99,600

Unknown costs: precinct costs, which are dependent on the actual number of additional precincts created due to Hawaiian Homes Commission boundary and district line changes, estimated to be between \$1,139 to \$2,164.

Copies of the Office of Election's letters to the Bureau dated August 26, 1999, and October 7, 1999, are attached as Appendices E and F, respectively.

(3) Expenses to Determine Eligibility

The Bureau has been unable to obtain reliable cost estimates of the expenses to determine voter (or candidate) eligibility. Nevertheless, since both the House and Senate versions of H.B. No. 235 designate the Department of Hawaiian Home Lands as the agency responsible for verifying qualifications imposed on candidates and voters, as noted earlier, the Bureau finds that the Department will most likely require additional appropriations to pay for increased staffing for HHC elections.

Under current law, the County Clerks “shall maintain records by computer tape or otherwise of office of Hawaiian affairs registered voters to facilitate their identification as a separate category of voters.”²⁵ Voters for the election of members of the Board of Trustees of the Office of Hawaiian Affairs must make and subscribe to an application in the form of an affidavit stating that the person is Hawaiian, along with the other information generally required for voter registration. The applicant must further swear to the truth of the allegations by self-subscribing oath in the affidavit. Unless contested by a qualified voter, the clerk may accept the allegation that the applicant is Hawaiian as prima facie evidence. Alternatively, the clerk may demand that the applicant furnish substantiating evidence to the allegations on the application.²⁶ The House and Senate versions apparently retain these registration responsibilities of the county clerks for Hawaiian Homes Commission elections,²⁷ but further impose a separate, independent requirement on the Department to determine eligibility.

²⁵ Hawaii Revised Statutes §11-14(d).

²⁶ Hawaii Revised Statutes §11-15(b) and (c). Section 13D-3(c), Hawaii Revised Statutes (OHA elections; qualification of voters; registration), further provides that “[a]ny person eligible to and desiring to register as a voter for the election of board members shall go to any location designated by the clerk of the county, then and there to be examined under oath as to the person's qualifications as a voter.” Section 13D-3(d) requires the county clerk to register all those in the county who are eligible and desire to register to vote for OHA Board of Trustees members. Pursuant to that subsection, the register “may be maintained in conjunction with the general county register; provided that the clerk shall be able to prepare a separate list of voters for the election of board members, capable of segregation by precinct and representative district.”

²⁷ H.B. No. 235, H.D. 2 (1999), sections 3 and 10 (p. 17, lines 3 to 12); H.B. No. 235, H.D. 2, S.D. 2 (1999), sections 3 and 10 (p. 19, lines 6 to 15).

However, the Department of Hawaiian Home Lands, in its September 23, 1999, letter to the Bureau (see Appendix D), noted the following:

Challenge of voters' and candidates' qualifications. Under both versions, any person qualified to vote or be a candidate shall complete an affidavit application, which states that the person is Hawaiian and that DHHL shall be responsible for verifying all qualifications imposed on candidates and voters. The affidavit applications provides for easy processing; however, should a challenge occur, the demand on DHHL will be substantial in cost and workload, without sufficient funding or flexibility of moving funds. (Emphasis added.)

It should be noted, however, that the comments of the Office of Elections that the affidavit applications provide for “easy processing” applies to cases in which the voter pool is composed of *any* Hawaiians. Where the voter pool is composed of Native Hawaiians, i.e., those who are 50% or more Hawaiian by blood quantum, additional administrative expenses are to be expected due to the three-generation proof needed to prove that blood quantum.

The Office of Elections further noted that while voter registration for Office of Hawaiian Affairs elections is handled by the clerks' offices of the various counties, neither the Office of Elections nor the county clerks offices have the capabilities to verify blood quantum requirements. The Office of Elections speculated that while “it is unknown what the administrative cost will be.... additional staffing will be required at each Office of the County Clerks to handle the task.” (See Appendix F.)

4. Other Issues

Before responding to the questions posed in this section, it is necessary to address the issue of whether a state department, board, or commission can be run by an elected body without a constitutional amendment, as briefly discussed in the introduction to this memorandum. The debate concerns an internal conflict within the Hawaii Constitution between Article XII, Section 3, and Article V, Section 6. This conflict is clearly explained in the 1998 *Report on the Hawaiian Homes Commission in Response to H.C.R. No. 135 (1998)*:²⁸

... Article XII, Section 3, of the State Constitution provides that §202 of the HHCA and other provisions relating to administration can be amended in the Constitution or in the manner required for State legislation.

Article V, Section 6 of the State Constitution, however, provides:

Except as otherwise provided in this constitution, whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor.... Such board, commission or other body may appoint a principal executive officer who... may be removed by a majority vote of the members appointed by the governor.

At a joint committee hearing on HB 3919, H.D. 3, before the Senate Committees on Hawaiian Affairs and on the Judiciary, on March 19, 1996, the State Attorney General's office testified that an elected HHC would violate the provisions of Article V, Section 6, of the State Constitution. Therefore, a constitutional amendment would be required to authorize the election of the HHC.

Other commentators disagree. These commentators cite §§4 and 7 of the Admission Act which required that the provisions of §4 be automatically adopted as part of the State Constitution upon approval of Statehood by the electorate. Statehood was approved and Article XII, Section 3 of the State Constitution is, in fact, the provisions of §4 of the Admission Act. Therefore, it is argued: Article XII, Section 3, which specifically allows the amendment of Section 202 of the HHCA in the manner required for State legislation, supersedes the more general requirements of Article V, Section 6.

In addition to the statutory construction argument noted above, commentators have noted that the fundamental issue involved is the right of self-determination of indigenous peoples. This right has been acknowledged by both the United States and the international community. Therefore, despite an arguable conflict between the Admission Act and Article XII, Section 3, on the one hand, and the provisions of Article V, Section 6, on the other; the Article V, Section 6, [provisions] should not be allowed to impede the implementation of an elected HHC as an element of self-determination. Indeed, these commentators believe the State has an affirmative duty to take an active role in assisting indigenous people's realization of self-governance.

The HHC and the DHHL are unique in U. S. government. The obligations under the HHCA were accepted by the State as a condition of Statehood and do involve the status

²⁸ 1998 HHC Report at 38-39.

of an indigenous people. There is no clearly established legal precedent to settle this issue. Thus, it could be strongly contested and require resolution by a court of law.

Although there are strong arguments on both sides of this issue, the state Attorney General, as noted in the 1998 HHC Report on the Hawaiian Homes Commission, has testified that an elected Hawaiian Homes Commission may violate the provisions of Article V, Section 6 of the Constitution (see Appendix C). Accordingly, the Bureau recommends that the Attorney General's opinion be followed until such time as the Attorney General opines otherwise,²⁹ or until a contrary opinion is rendered by a court of competent jurisdiction. Additionally, the Bureau recommends that a formal written legal opinion be obtained from the Attorney General on this and related issues, if for no other reason than to ascertain their current position in advance.

Because in the opinion of the Attorney General an elected Hawaiian Homes Commission may violate Article V, Section 6 of the State Constitution, an amendment to the Constitution may be necessary prior to the establishment of an elected Commission. The Legislature may pursue a constitutional amendment at the same time that it requests an opinion from the Attorney General, however, and need not wait for the Attorney General's response. (A copy of a bill that would make those constitutional amendments is attached as Appendix G.) The following questions are answered in the context of this recommendation:

When Should the Election Take Place?

The House version of H.B. No. 235 refers to a year 2000 election,³⁰ while the Senate version refers to a year 2002 election.³¹ The Bureau believes that a year 2002 election is preferable for the following reasons.

²⁹ The Attorney General noted that "[f]urther research into the legislative and constitutional history of these provisions is required to resolve the question whether the change to an elected commission should be accomplished by legislation or by constitutional amendment. We will present the results of our research as soon as possible." Testimony of the State Attorney General on H.B. No. 3919, H.D. 3, Relating to Hawaiian Homes Commission, before the Senate Committee on Hawaiian Affairs and the Senate Committee on Judiciary, March 19, 1996, p. 3. Mr. George Kao of the Attorney General's office noted that he was unaware of any further testimony or other commentary on this issue from the Attorney General. (Telephone conversation with Attorney General's office, Regulatory Division, October 6, 1999.)

³⁰ H.B. No. 235, H.D. 2 (1999), section 10 (page 17, line 19).

³¹ H.B. No. 235, H.D. 2, S.D. 2 (1999), section 10 (page 19, line 20), and section 12 (page 22, line 4).

Because of the need for a constitutional amendment, as discussed earlier, the Bureau recommends that the election take place concurrently with the first general election following ratification of the proposed constitutional amendments. If the proposed constitutional amendments are printed on the ballot and ratified by the electorate in conjunction with the next general election in the year 2000, the first general election following ratification would be the year 2002.

This recommendation is based in part on the effective date for the Office of Hawaiian Affairs, as found in Article XVII, Section 8, of the Hawaii Constitution, which provides that “[t]he legislature shall provide for the implementation of the amendments to Article XII in Sections 5 and 6 [relating to the Office of Hawaiian Affairs, Establishment and Powers of the Board of Trustees] on or before the first general election following ratification of the amendments to Article XII in Sections 5 and 6.” (Emphasis added.)

Moreover, there are other concerns that need to be addressed in a Hawaiian Homes Commission election that were not of concern in an Office of Hawaiian Affairs election, namely, the additional time needed for federal review and congressional consent. According to the testimony of the Department of Hawaiian Home Lands on H.B. No. 235, H.D. 1, on February 26, 1999:³²

Finally, H.B. 235, H.D. 1 recommends that the first election occur in the year 2000. We are concerned that this may not provide adequate time to prepare for the election. Moreover, the U.S. Department of the Interior has expressed a desire to review any proposed amendment to the Hawaiian Homes Commission Act containing a severability clause. We therefore believe this bill, if enacted, will require congressional consent, and recommend that the effective date of the election ... [be] amended to the year 2002.

Whether the election is a special election held in conjunction with the general election (under the House version), or the general election itself (as in the Senate version),³³ a provision similar to

³² Testimony of Raynard C. Soon, Interim Chairman, Hawaiian Homes Commission, on H.B. No. 235, H.D. 1, Relating to the Hawaiian Homes Commission, before the House of Representatives Committee on Finance, February 26, 1999, p. 2.

³³ The language “special election held in conjunction with the general election”, as found in section 13D-4, Hawaii Revised Statutes (election of OHA board members), is preferable to a “general election” of Hawaiian Homes Commissioners, since a “special election” as defined in section 11-1, Hawaii Revised Statutes, refers to “any single election required by law when not preceded by an election to nominate those candidates whose names appear on the special election ballot.” In other

Article XVII, Section 8, would presumably give the Legislature sufficient time to prepare statutory amendments to implement the constitutional amendments that would be subject to ratification, as well as allow sufficient time to obtain congressional consent.

How Should Vacancies Be Filled?

Both the House and Senate versions of H.B. No. 235 provide for the filling of vacancies in the elected Hawaiian Homes Commission in a manner similar to that provided in section 17-7, Hawaii Revised Statutes, with respect to vacancies in the membership of the Board of Trustees of the Office of Hawaiian Affairs. Section 17-7 includes alternative provisions for filling vacancies in the board membership, depending on whether or not the member's term ends at the next succeeding special election held in conjunction with the general election. Section 17-6, Hawaii Revised Statutes, specifies the manner in which vacancies are to be filled for Board of Education members.

There are several differences between the two versions, however, based primarily on the different method of electing the board members. For example, the House version includes provisions relating to residency requirements to accommodate an at-large seat, which is not included in the Senate version. The House version, but not the Senate version, also includes language contained in section 17-7(c), Hawaii Revised Statutes, relating to appointments to be made without regard to the appointee's party preference or nonpartisanship.

Finally, both versions contain a provision that the section of the bill relating to vacancies (section 2 in both versions) applies only to vacancies which are not filled by the method provided in section 202 of the Hawaiian Homes Commission Act, as amended. The House version contains a provision that is absent from the Senate version, in its amended version of section 202, which provides that any vacancy that may occur through any cause other than the expiration of a term of office is to be filled for the duration of the expired term by the candidate who had received the next highest number of votes for that seat. If this method does not result in filling the vacancy, then the vacancy is to be filled in accordance with section 2 of the House version.

words, there does not appear to be the need for a primary election under either the House or Senate versions of H.B. No. 235; a special election held concurrently with a general election would therefore be the preferred method.

Under current law, the members of the Hawaiian Homes Commission are to be “nominated and appointed” in accordance with section 26-34, Hawaii Revised Statutes. Section 26-34(c) provides that vacancies occurring in the membership of a board during a term shall be filled for the unexpired term subject to Article V, Section 6 of the Constitution.

The filling of vacancies on the Hawaiian Homes Commission is a policy decision for the Legislature. The version selected for the filling of vacancies ultimately depends on which type of election, whether under the House or Senate version, is chosen by the Legislature. In either case, the Bureau recommends that the language contained in section 17-7(c), Hawaii Revised Statutes, relating to appointments made without regard to the appointee's party preference or nonpartisanship, be retained, as found in the House version.

How Should the Director of Hawaiian Home Lands Be Selected?

The House version of H.B. No. 235 specifies that the Governor, with the advice and consent of the Commission, shall appoint the director of the department.³⁴ The Senate version, on the other hand, states that the Commission shall appoint the director of the department.³⁵ Current law requires the Governor to appoint the chairperson of the Commission, who is also the executive officer of the Department of Hawaiian Home Lands, from among its members.³⁶

The two other state programs that are administered by elected bodies hire their own executive directors, similar to the Senate version of H.B. No. 235. The Board of Education appoints a Superintendent of Education as the chief executive officer of the public school system.³⁷ The Office of Hawaiian Affairs appoints, by majority vote, an administrator of the Office who serves as its executive officer.³⁸

³⁴ H.B. No. 235, H.D. 2 (1999), section 10 (page 12, lines 21 to 23).

³⁵ H.B. No. 235, H.D. 2, S.D. 2 (1999), section 10 (page 13, lines 13 to 14).

³⁶ Hawaiian Homes Commission Act §202(a); Hawaii Revised Statutes §26-17.

³⁷ Hawaii Constitution, Article X, Section 3; Hawaii Revised Statutes §302A-1101.

While the selection of the director is a policy decision for the Legislature, the Bureau recommends that the Senate version of H.B. No. 235 be followed in this area, namely, that the Commission appoint the director of the department. The Bureau believes that the Senate version, which is consistent with the Board of Education's and Office of Hawaiian Affairs' models, ensure that the role of the elected Commission remains primarily one of policy-making, while the executive director of the department performs the day-to-day implementation of those policies under the Commission's direction. In contrast, the House version may ensure that the director remains loyal to the Governor, who may or may not be interested in implementing the same policy concerns as that of the elected Commission. While a Governor-appointed director may be better able to work with the Governor to secure limited state resources, a Commission-appointed director, in contrast, presumably will retain allegiance to the elected Commission in the event that the Governor and Commission differ over policy direction.

Assuming that Article V, Section 6, of the Hawaii Constitution controls, paragraph three of that section provides that the board, commission or other body that is the head of a principal department of state government "may appoint a principal executive officer who, when authorized by law, may be an ex officio, voting member thereof, and who may be removed by a majority vote of the members appointed by the governor." This section would therefore appear to allow, but not require, the board to appoint its own executive officer.

Who Should Be Responsible for the Day-to-Day Operations of the Hawaiian Homes Commission?

Both the House and Senate versions of H.B. No. 235 provide for a separate Director of Hawaiian Home Lands to administer the day-to-day operations of the Commission.³⁹ Current law provides for the chairperson of the Commission to also serve in that capacity.⁴⁰

³⁸ Hawaii Constitution, Article XII, Section 6; Hawaii Revised Statutes §10-10.

³⁹ H.B. No. 235, H.D. 2 (1999), sections 7 and 10; H.B. No. 235, H.D. 2, S.D. 2 (1999), sections 7 and 10.

⁴⁰ Hawaiian Homes Commission Act §202(a); Hawaii Revised Statutes §26-17.

The two other state programs that are administered by elected bodies provide for the hiring of a separate executive director to handle day-to-day operations. The Board of Education hires a Superintendent of Education to serve as “the chief executive officer of the public school system having jurisdiction over the internal organization, operation, and management” of that system.⁴¹ The Board of Trustees of the Office of Hawaiian Affairs hires an administrator to perform “such powers and duties as may be proper for the performance of the powers and duties vested in the board”.⁴²

The question is whether the day-to-day operations of the Hawaiian Homes Commission should be handled by the Commission's chairperson or by a separately appointed executive director. The 1998 HHC Report to the Legislature on the Hawaiian Homes Commission noted that the selection of the chair and director has changed over time: “In 1921, the Governor and four appointees sat on the HHC and they selected their leader, who was also the executive. In 1944, when the Governor was removed as a member of the HHC and appointed all five members, the Governor designated the chair of the HHC, but the HHC hired its executive director. This same process remained until 1963, when the law changed to allow for a full time chair appointed by the Governor who also serves as the director of the Department of Hawaiian Home Lands.”⁴³

The Council of State Governments has commented that although boards and commissions are justified for agencies with significant quasi-legislative or quasi-judicial powers, the day-to-day operations of the agency should be administered through a single executive:⁴⁴

So far as possible, eliminate the use of boards and commissions for administrative work. Plural-headed agencies tend toward lethargy, indecision, and an undesirable diffusion of responsibility. Where a variety of experience and opinion needs to be brought to bear on problems at the administrative level, it can be supplied in most cases by an advisory board which will counsel but not detract from the authority and responsibility of a single administrator. In cases where and agency has significant quasi-legislative or quasi-judicial functions, a board can be justified, but the operating

⁴¹ Hawaii Revised Statutes §302A-1111(a); see also Hawaii Constitution, Art. X, §3.

⁴² Hawaii Revised Statutes §10-5(6); see also Hawaii Constitution, Art. XII, §6.

⁴³ 1998 HHC Report, p. 34.

⁴⁴ Russell S. Kato, *Hawaii Constitutional Convention Studies 1978, Article IV: The Executive* (Honolulu: Legislative Reference Bureau, May 1978), p. 54 (citing Council of State Governments, *Reorganizing State Government, A Report on Administrative Management in the States and a Review of Recent Trends in Reorganization* (Chicago: 1950), pp. 3-5, 14-20).

affairs of the agency should be administered through a single executive. On the operating level the affairs of plural-headed agencies should be integrated as far as possible with the rest of the executive branch. (Emphasis added.)

While the issue is one of policy for the Legislature, the Bureau believes that an elected Hawaii Homes Commission should have an executive director who is separately appointed from the chairperson of the Commission to be responsible for the Commission's day-to-day operations, similar to the models presented by the Board of Trustees of the Office of Hawaiian Affairs and the Board of Education. A separate executive director who is responsible for purely administrative duties will help to facilitate policy coordination, provide greater speed and flexibility day-to-day decision-making, and offer clearer lines responsibility and accountability.⁴⁵

How Should the Chairperson of the Commission be Selected?

The House version of H.B. No. 235 states that the chairperson of the Commission shall be selected by the members of the Commission.⁴⁶ The Senate version states that the at-large commissioner (as elected pursuant to that version) shall be the chairperson of the Commission.⁴⁷ As noted earlier, current law requires the Governor to appoint the chairperson of the Commission from among its members.⁴⁸

The two other state programs that are administered by elected bodies select their own chairperson from among the board membership, similar to the House version of H.B. No. 235. The Board of Education elects a chairperson and a vice-chairperson from among its own membership.⁴⁹ At its first meeting after an election, the Office of Hawaiian Affairs also elects from its own membership a chairperson and a vice-chairperson, who serve at the pleasure of the board.⁵⁰

⁴⁵ Id. (citing the position of the Western Governors' Conference).

⁴⁶ H.B. No. 235, H.D. 2 (1999), section 10 (page 12, lines 18 to 21).

⁴⁷ H.B. No. 235, H.D. 2, S.D. 2 (1999), section 10 (page 13, lines 11 to 12).

⁴⁸ See *supra* note 40.

⁴⁹ Hawaii Revised Statutes §302A-1106.

While the selection of the chairperson is one of policy for the Legislature, the Bureau recommends that the House version of H.B. No. 235 be followed in this area, namely, that the Commission's chairperson be selected by Commission members. The Bureau believes that the House version, which is consistent with the Board of Education's and Office of Hawaiian Affairs' models, may help to ensure greater accountability to its beneficiaries and potentially bring increased responsiveness to problems encountered by homesteaders, while providing somewhat greater flexibility in allowing the Commission to select its own leadership than the Senate version.

Conclusion and Recommendations

Before reaching the substantive provisions of a bill to provide for an elected Hawaiian Homes Commission, the Bureau recommends that the Legislature defer consideration of such a bill pending the outcome of Rice v. Cayetano, as recommended in the Attorney General's March 1999 testimony on H.B. No. 235. However, the Legislature may nevertheless introduce in the 2000 Regular Session a *separate* bill proposing a constitutional amendment to provide for an elected Hawaiian Homes Commission prior to the resolution of that case. A copy of a bill proposing a constitutional amendment is attached as Appendix G.

Once Rice v. Cayetano has been resolved, the Bureau recommends that the Legislature seek a formal written opinion from the Attorney General if for no other reasons than to ascertain their position in advance on the following legal issues raised in this memorandum:

1. The effect, if any, of the U.S. Supreme Court's decision in Rice v. Cayetano on a proposed elected Hawaiian Homes Commission, including whether either the House or Senate version of H.B. No. 235 would be constitutionally permissible in light of that decision; and
2. Whether an elected Hawaiian Homes Commission violates Article V, Section 6 of the Hawaii Constitution, or whether the Commission can be run by an elected body without a constitutional amendment.

⁵⁰ Hawaii Constitution, Article XII, Section 5; Hawaii Revised Statutes §10-8.

The Bureau recommends introducing a constitutional amendment *before* receiving the Attorney General's written opinion on these issues since it is uncertain when the Supreme Court will rule on Rice v. Cayetano and what that ruling will be. At the worst, a constitutional amendment may not be necessary. However, if such an amendment is not introduced now, and it is later determined that one is necessary, there would be a need to wait for a subsequent legislative session in which to consider such an amendment.

Other legal questions raised in the 1998 Report on the Hawaiian Homes Commission that could be addressed by the Attorney General include whether U.S. Constitutional provisions for one person-one vote apply to a Hawaiian Homes Commission election, how much authority the State can delegate to the voters consistent with the State's trust obligations, and whether Congressional approval is required to amend the Hawaiian Homes Commission Act to provide for the election of commissioners.⁵¹

However, at least with respect to the last issue, the issue of whether Congressional consent is needed is not subject to the control of the State. Therefore, although an Attorney General's opinion may be useful on this subject, it is not dispositive of the issue itself. For example, even if the Attorney General concludes that Congressional consent is not necessary in this case, Congress may decide otherwise, preempting the State's interpretation.

Once these legal issues have been resolved to the satisfaction of the Legislature, and a constitutional amendment, if necessary, has been ratified by the voters, then the Legislature should consider legislation that would incorporate the following substantive provisions, as discussed in this memorandum:

- Voters for an elected Hawaiian Homes Commission could either be limited to all native Hawaiians (adults with a blood quantum of 50% or more) or to all Hawaiians regardless of blood quantum. There are some problems with both, however, related to proving their Hawaiian identity. The suggestion of using only existing lessees, however, is problematic and should not be used;

- While one source indicates that the one person-one vote rule arguably would not apply to an elected Hawaiian Homes Commission, the safer ground is to assume that it will. However, the one person-one vote rule does not have anything to do with limiting voter eligibility by blood quantum. It concerns how the voting districts are established. One of the two options is an OHA-type system, where everyone votes for each representative, but some representatives are required to be residents of certain islands to provide for more local representation. The other option is similar to the state legislature, where individual districts of roughly equal size vote for each representative. This second model, however, gives O'ahu the most elected officials due to its larger population base. The more representative and thus better model is the OHA model;
- The creation of at-large members is a policy decision. The reason for such a choice would be that at-large members might be more willing to consider the good of the group as a whole rather than being tied to local concerns. The reason against such a choice is that the situation may end up with too many representatives from the same place (most likely O'ahu, which is a concern for neighbor island voters);
- The commission members should not be limited to any group smaller than all Hawaii residents. While other smaller groups of Hawaiians were suggested, it is not good public policy for the state legislature to take the position that only a group of potential or actual beneficiaries is capable of properly administering the trust. (While OHA does restrict its representative in this manner, that arrangement arose from the 1978 Constitutional Convention and was ratified by the voters, and was not established by the legislature.) If it is important to the voters, who themselves will be Hawaiian or native Hawaiian, that their representatives be of Hawaiian ancestry, then only those people will be elected. However, if the voters want to select the best representatives regardless of ethnicity, the largest reasonable pool of talent should be available to them, which would be any state resident.

⁵¹ 1998 HHC Report at 37-38, 40-44.

- Administration and operation expenses related to a Hawaiian Homes Commission election should be paid for out of the state general fund;
- Administration and operation expenses *not* related to a Hawaiian Homes Commission election should be paid for out of a combination of state general funds and funds available from the Hawaiian Home Administration Account under section 213(f) of the Hawaiian Homes Commission Act;
- Expenses to determine voter and candidate eligibility are election-related expenses that should be paid for out of the state general fund;
- A Hawaiian Homes Commission election should take place concurrently with the first general election following ratification of proposed constitutional amendments. For example, if these amendments are printed on the ballot and ratified by the electorate in conjunction with the next general election in the year 2000, the first general election following ratification would be in the year 2002. This would presumably give the Legislature sufficient time to draft implementing legislation;
- The method of filling of vacancies is a policy decision for the Legislature. However, language relating to appointments made without regard to the appointee's party preference or nonpartisanship found in section 17-7(c), Hawaii Revised Statutes, should be retained;
- The manner of selecting the Director of Hawaiian Home Lands is also one of policy for the Legislature. However, it may be preferable to allow the Commission to appoint the director of the department. While a Governor-appointed director may be better able to work with the Governor to secure limited state resources, a Commission-appointed director presumably will retain allegiance to the elected Commission if the Governor and Commission differ over policy direction;

- The role of the Commission should be primarily one of policy-making, while the director should focus on day-to-day operations and the implementation of the Commission's policies; and
- While the manner of selecting the chairperson of the Commission is one of policy, the Bureau recommends that the Commission's chairperson be selected by Commission members to help ensure accountability to beneficiaries, increase responsiveness to homesteaders, and provide flexibility in allowing the Commission to select its own leadership.

Finally, the Bureau notes that the beneficiaries of the Hawaiian Home Lands trust -- the Native Hawaiian people -- have long been victimized by federal and state breaches of the Hawaiian Home Lands program, including the governments' failure to return Native Hawaiians to their lands or protect their civil rights. The Hawaii Advisory Committee to the United States Civil Rights Commission, in its 1991 publication, *A Broken Trust*, maintained that:⁵²

... it is unlikely that the Hawaiian homes program will ever succeed unless the trust functions can be managed in a more independent, aggressive, and creative manner, with increased accountability to the beneficiaries. Indeed, the new administrative structure should be governed and primarily directed by Native Hawaiians. This recommendation is in keeping with the mandate of the Hawaii Supreme Court which specified that the trustee is obligated to administer the trust solely in the interest of the beneficiary. The current structure fails this test.

Accordingly, in resolving questions relating to an elected Hawaiian Homes Commission, the Bureau recommends that the Legislature focus on the most important consideration of all, namely, what is in the best interests of the beneficiaries of the Hawaiian Home Lands trust, so that an elected Commission will be accountable to its beneficiaries, give them a greater opportunity to have a say in decisions that affect their lives, and serve as a strong, independent advocate for their economic self-sufficiency.

⁵² Hawaii Advisory Committee to the United States Commission on Civil Rights, *A Broken Trust: The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil rights of Native Hawaiians* (December 1991), p. 47; see also Susan C. Faludi, "How Everyone Got Hawaiians' Homelands Except the Hawaiians" *The Wall Street Journal*, September 9, 1991, pp. A1, A6.

Appendix A



HOUSE OF REPRESENTATIVES

STATE OF HAWAII
STATE CAPITOL
HONOLULU, HAWAII 96813

July 19, 1999

HMS 4331

Mr. Wendell K. Kimura
Acting Director
Legislative Reference Bureau
415 S. Beretania Street
Honolulu, Hawaii 96813

Dear Mr. Kimura:

Last session, the Legislature considered H.B. No. 235, H.D. 2, S.D. 2 (RELATING TO THE HAWAIIAN HOMES COMMISSION), which would have provided for an elected Hawaiian Homes Commission (HHC). Although both chambers agreed to the broad concept of an elected HHC, we were unable to resolve a number of very important components of this bill, such as voter eligibility, HHC member qualifications, sources of funding, and other related items

Since this is an issue of importance in our State, we hope to acquire additional information during the legislative interim and continue our deliberation on this measure during our 2000 legislative session. We would like to request your agency to assist us in this regard. Specifically, using H.B. 235, H.D. 2, and H.B. 235, H.D. 2, S.D. 2, as a base, we would like the Legislative Reference Bureau to conduct a study on establishing an elected HHC.

This study should examine:

1 Voter Eligibility:

- What is the potential impact of the Rice v. Cayetano case, which is scheduled to be heard in October by the United States Supreme Court?
- Should voters be limited by:
 - Some Hawaiian blood quantum;
 - Eligibility to receive homestead leases;
 - Current status as a homestead lessee; or
 - Other criteria?
- Depending on the criteria used, how will the base of eligible voters be determined?
- How will the one person, one vote criteria be addressed if voters are limited by:

- | Some Hawaiian blood quantum;
- | Eligibility to receive homestead leases; or
- | Status as a homestead lessee?

2. Member Qualifications:

- How should districting of members be determined?
- Should at-large members be allowed?
- | Should members be limited to:
 - Some Hawaiian blood quantum;
 - | Eligibility to receive homestead leases;
 - | Current status as a homestead lessee;
 - Individuals living on homestead property
 - | Hawaii resident;
 - United States resident; or
 - Other criteria?

3. Source of Funding:

- | How should the following be paid for:
 - HHC administration and operation expenses;
 - | Election-related expenses; and
 - | Expenses to determine voter eligibility?
- What is the cost estimate for each of the above items?
- | Should expenses be paid from the general fund, the Hawaiian Home Administration Account, some other source, or a combination of the above?

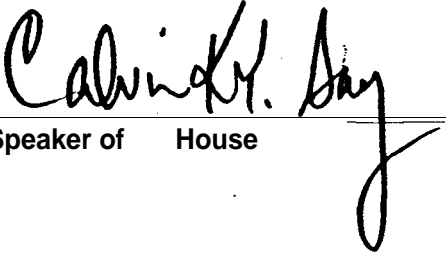
4. Other Issues:

- | When should the election take place?
- | How should vacancies be filled?
- How should the director of the Department of Hawaiian Home Lands be selected?
- | Who should be responsible for the day-to-day operations of HHC?
- How should the chairperson of the Commission be selected?

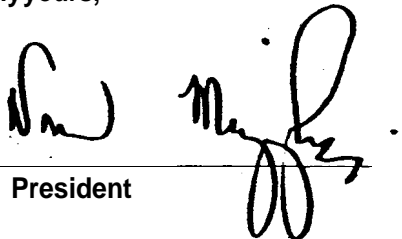
Mr. Wendell Kimura
July 19, 1999
Page 3

Please complete this report and submit your findings and recommendation, including proposed legislation, to us no later than 20 days before the convening of the Regular Session of 2000. Thank you very much for your cooperation.

Sincerely yours,



Speaker of House



Senate President

Appendix B

LATE

**THE TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL**

on

**HB 235, SD 2
RELATING TO THE HAWAIIAN HOMES COMMISSION**

**BEFORE THE SENATE COMMITTEE ON
WATER, LAND, AND HAWAIIAN AFFAIRS
AND
SENATE COMMITTEE ON JUDICIARY
(JOINT HEARING)**

DATE: Wednesday, March 24, 1999

TIME: 2:00 p.m.

P L A C E : State Capitol, Conference Room 225

PERSON(S) TESTIFYING: Margery S. Bronster
Attorney General

or

**Kathleen Watanabe
Deputy Attorney General**

35 Copies submitted to Committee Clerk, Room 218

Testimony of the State Attorney General
on H.B. 235, H.D. 2
RELATING TO THE HAWAIIAN HOMES COMMISSION

The Honorable chairpersons and Committee Members:

The State Attorney General takes no position as to the intent of this measure but recommends that the bill be deferred until after the United States Supreme Court issues a decision in Harold F. Rice v. Benjamin J. Cayetano, Governor of the State of Hawaii, No. 98-818, (“Rice”) a case that directly impacts the voting right of native Hawaiians.

Recently, the high court agreed to review the decision of the Ninth Circuit Court of Appeals. The issue in the Rice case is whether the requirement that a person be Hawaiian in order to vote for the election of members of the board of trustees of OHA (herein “voting restriction”) was based not upon race but upon recognition of the unique status of native Hawaiians as beneficiaries of the trust obligations owed and directed by Congress and the State of Hawaii. The lower court upheld the voting restriction, finding that the voter restriction rationally related to the fulfillment of the unique obligations to native Hawaiians. The voting restriction also did not violate the Fifteenth Amendment, as the court found that the election of OHA trustees qualified as a special purpose election that allowed limiting the electorate.

On appeal, the Ninth Circuit emphasized, and relied heavily upon, the fact that “the constitutionality of the racial classification that underlies the trusts and OHA is not challenged in this case,” and that, accordingly, “we must accept the trusts and their administrative structure as we find them, and assume that both are lawful.” The Ninth Circuit applied the principles of Slayer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973) (special purpose election), and Morton v. Mancari, 417 U.S. 535 (1974) (only a rational basis is required for

Indian preferences to survive equal protection challenge). The Ninth Circuit held that Hawaii could rationally conclude that Hawaiians, **being** the group to whom the trust obligations run, should be the group to decide who the trustees ought to be.

Furthermore, the Ninth Circuit concluded that the voting restriction would survive even strict scrutiny because it serves “the state’s compelling **responsibility** to honor the trust” and “is precisely tailored to the perceived value that a board ‘**chosen from among those who are interested**’ parties would be the best way to insure proper management **and adherence to the needed fiduciary** principles.”

Now, ~~the~~ U.S. Supreme Court has agreed to review ~~whether the~~ Ninth Circuit's ruling was correct. It is not clear when we can expect a ruling as the U.S. Supreme Court is under no time constraints and may issue rulings at its discretion.

H.B 235, H.D.2, among other things, **proposes** that members of the Hawaiian **homes** commission be elected in the same way as OHA **trustees rather than appointed**. As with OHA **elections, both the candidates as well as the electorate are required to be Hawaiian**. If this bill becomes law before the U.S. Supreme Court rules, any resulting election **of the Commission members would be subject to the U.S. Supreme Court ruling** **Prudence** requires that ~~the~~ bill be deferred until the U.S. Supreme Court rules in the Rice case.

Thank you for the opportunity to **testify** on this matter.

TESTIMONY OF THE STATE ATTORNEY GENERAL

LATE

ON H.B. NO. 3919, H.D. 3

RELATING TO HAWAIIAN HOMES COMMISSION

**BEFORE THE SENATE COMMITTEE ON HAWAIIAN AFFAIRS
AND
THE SENATE COMMITTEE ON JUDICIARY**

DATE: TUESDAY, March 19, 1996

TIME: 3:30 P.M.

**PLACE: Conference Room 225
state Capitol
415 South Beretania Street**

PERSON(S) TESTIFYING:

**Margery S. Bronster
Attorney General**

Of

**George- K.K. Kaeo
Deputy Attorney**

Deliver to Room 223, Committee Clerk's Office (35 copies)

TESTIMONY OF THE STATE ATTORNEY GENERAL
ON H.B. NO. 391, H.D. 3
RELATING TO ELECTION OF THE HAWAIIAN HOMES COMMISSION

The Honorable Chairperson and Committee Members:

The State Attorney General is responding to concerns about the constitutional validity of this bill. The purpose of this bill is to change the manner in which the Hawaiian Homes Commission members are selected, from an appointment process to an election process.

An argument can be made that the subject matter of this bill is controlled by the third paragraph of section 6, article V, of the State Constitution, which states in pertinent part that:

Except as otherwise provided in this constitution, whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor.

The reports of the Constitutional Convention of Hawaii of 1950 and 1968 indicate that this provision is intended, with limited exceptions, to apply to all boards and commissions which head a principal department, particularly in light of the philosophy expressed by the delegates regarding the desirability of a strong executive:

The fundamental principle upon which your Committee Proposal was drafted is that of concentration of executive power in the Governor, which would give best government. Consistent with this principle, your Committee Proposal provides for the election of only the Governor and the Lieutenant Governor and for the appointment of principal department heads to serve at the pleasure of the Governor.

¹ Proceedings of the Constitutional Convention of Hawaii of 1950, at 215 (1960).

The phrase in section 6, article V, "[e]xcept as otherwise provided in this constitution" was added in 1968, specifically to address a 1964 constitutional amendment that allowed for an elected board of education. According to the Style Committee:

As originally approved by the Committee of the Whole during the 1950 Constitutional Convention, the first ~~sentence~~ of the above paragraph started out with the words: "Except as otherwise provided in this Constitution."

The Style Committee of the 1950 Convention omitted these words. It explained in its report:

"At the time of the adoption of the report on Executive Powers and Functions the manner to be followed in the selection of the board of education had not been determined. ~~The~~ words which have been deleted in the (Style Committee) redraft were provided in the original draft to care for the possibility of a board of education being selected in some other manner than by appointment by the governor.

"In view of the fact that this Constitution makes no exception in the case of the selection of school board members, and in view likewise of the fact that there are no other exceptions, your committee is of the opinion that the reference to exceptions is unnecessary."

In 1964, however, the Constitution was amended to Provide for an elected board of education. Now the clause "except as otherwise provided in this Constitution" is necessary to bring Article IV into harmony with Article IX (Education)_

Without it, the two articles conflict and the opening statement of the third paragraph of Section 6 is untrue. Logically, a reader could reason this way: 1. All boards that head major state departments are appointed. 2. The board of education is a board that heads a major state department_ 3. Therefore, the board of education is appointed.

1 Proceedings of the Constitutional Convention of Hawaii of 1966, at 274-75 (1973).

Given the intent expressed by the drafters of section 6, article V, of the State Constitution, this bill may violate that provision.

It has also been pointed out that the Hawaiian Homes Commission Act (HHCA) is an integral part of the State Constitution_ The State Constitution provides that amendments to provisions of the HHCA that relate to “administration... may be amended in the constitution, or in the manner required for state legislation...” Section 3, article XII, ; see also, section 4, Hawaii Admission Act_.

Further research into the legislative and constitutional history of these provisions is required to resolve the question whether the change to an elected commission should be accomplished by legislation or by constitutional amendment. We will present the results of our research as soon as possible.

Thank you for the opportunity to testify on this matter.